(9)

No. 90-1124

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

Keith Jacobson

Petitioner,

v.

The United States of America

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR AMICI CURIAE HON. THOMAS J. BLILEY, JR., ET AL. IN SUPPORT OF RESPONDENT

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Attorneys for Appellant and Appellee have consented to the filing of an Amici Curiae brief by the Honorable Thomas J. Bliley and other Members of the United States Congress (See Appendix.)

INTEREST OF THE AMICI CURIAE

Amici are Members of the United States Congress. Amici's interest in this case is prompted by the fact that Congress has enacted various pieces of legislation intended to suppress the sexual exploitation of children that occurs through the production, distribution, and possession of child pornography. By its very nature, production and trafficking in child pornography is highly clandestine. Those who traffic in child pornography generally place heavy reliance on the mails as the means for distributing and receiving materials depicting minors engaged in sexually explicit conduct. Therefore investigative techniques such as those employed in this case are essential to the vigorous enforcement of federal child pornography statutes. We

urge this Court to find that the defendant was not entrapped as a matter of law and was not subjected to governmental conduct so outrageous as to require that his conviction be overturned.

INTRODUCTION AND SUMMARY OF ARGUMENT

The defendant was convicted of violating 18 U.S.C. § 2252(a)(2), prohibiting the sexual exploitation of children through the receipt of materials depicting minors engaging in sexually explicit conduct. This Court has granted certiorari to review whether the defendant was entrapped as a matter of law.

When Congress enacted 18 U.S.C. § 2252, it sought to reach the evil of the sexual exploitation of children that is interwoven with the distribution of child pornography. In enacting and later amending that statute, Congress was aware of the covert traffic that occurs in children and child pornography. Congress was also aware of the innovative investigative techniques, such as those employed in this case, that are necessary to detect and apprehend those who

traffic in depictions of minors engaging in sexually explicit conduct.

The outcome of this case will do far more than affect the development of abstract principles of law. The outcome of this case will have very real effects on the well-being and lives of innocent children who are being sexually exploited in unspeakable ways. Therefore, we would urge the Court to consider the fact that any general rule that it may fashion expanding the entrapment defense with respect to postal investigations will have a severely debilitating effect on the enforcement of child pornography laws.

ARGUMENT

A. BOTH CONGRESS AND THIS COURT HAVE PREVIOUSLY RECOGNIZED THE COMPELLING GOVERNMENTAL INTEREST IN PROHIBITING CHILD PORNOGRAPHY.

1. The Protection of Children Against Sexual Exploitation Act of 1977.

Federal statutes prohibiting the sexual exploitation of children through the production of pornography -- as dis-

tinct from federal prohibitions on the distribution of obscene materials generally -- are of relatively recent origin. They reflect a concern that "[e]ach year tens of thousands of children under the age of 18 are believed to be filmed or photographed while engaging in sexually explicit acts for the producer's own pleasure or profit." H. Rep. No. 536, 98th Cong., 1st Sess., (Nov. 10, 1983) reprinted in 1984 U.S. Code Cong. & Admin. News, 492. The first measure passed by Congress to expressly reach such conduct was the Protection of Children Against Sexual Exploitation Act of 1977 (the "1977 Act"). The 1977 Act had three basic purposes: 1) to prohibit interstate transportation of boy prostitutes[1]; 2) to prohibit the use of children in the production of sexually explicit materials; and 3) to provide increased penalties for trafficking in obscene materials depicting children.

Congress' enactment of the 1977 Act reflected findings that child pornography and child prostitution had grown to

[1] Interstate transportation of minor female prostitutes was then prohibited under the Mann Act.

be a "highly organized, multimillion dollar industr[y] that operate[s] on a nationwide scale." S. Rep. No. 438, 95th Cong., 2d Sess., at 5 (1977) reprinted in 1978 U.S. Code Cong. & Admin. News, 42. Congress found that the materials in question "depict children, some as young as three to five years of age, in couplings with their peers of the same and opposite sex, or with adult men and women. The activities featured range from lewd poses to intercourse, fellatio, cunnilingus, masturbation, rape, incest and sado-masochism." Id. at 43. Such materials are produced in the form of magazines, "ten to twelve minute films known as 'loops,' still photographs, slides, playing cards, and video cassettes." Id.

The hearings which led to passage of the 1977 Act revealed "a close connection between child pornography and the equally outrageous use of young children as prostitutes." Id. at 44. Congress found that the typical boy victim of both pornography and prostitution related activities was between the ages of eight and seventeen and that the sexual exploitation of children through prostitution

and the production of pornography "cannot help but have a deep psychological, humiliating impact" on its victims. Id. Children who have been sexually exploited "often grow up in an adult life of drugs and prostitution... [and] many adults who were molested as children tend to become child molesters themselves, thus continuing the vicious cycle." Id. at 46.

Congress recognized that the distribution and receipt of child pornography contributes to further incidents of child abuse:

> [M]any pedophiles -- those whose sexual preference is for children -- prefer to purchase [child pornography] through mail order catalogues. This is because often these catalogues permit the pedophile to order materials depicting specific sexual deviations, to establish contact with other pedophiles, and even to establish liaisons with some of the child models.

Id. at 43.

Finally, Congressional policy as expressed in the Committee report on the 1977 Act rejected the notion that Federal enforcement efforts should be limited solely to large scale distributors of child pornography. To the contrary, the House Judiciary Committee was "pleased to note

that in recent months federal authorities have begun a much more extensive crackdown on child pornography. For example, rather than just investigating large scale dealers in child pornography the Postal Service now investigates every complaint and every mail order advertisement for pornographic materials that depict children." Id. at 45.

The 1977 Act as it emerged from conference contained, inter alia, two new sections to title 18 (sections 2251 and 2252) prohibiting the sexual exploitation of children in the production of pornographic materials and trafficking or receiving such materials. As contained in the 1977 Act, it was an element of the trafficking offense that the materials involved be "obscene."

(2) The Case of New York v. Ferber

This Court, in New York v. Ferber, 458 U.S. 747 (1982), had occasion to rule on a New York statute prohibiting the distribution of child pornography. The New York statute's prohibition was more sweeping than the version of 18 U.S.C. § 2252 as reflected in the 1977 Act inasmuch as it encompassed the distribution of materials which depict

children engaging in sexually explicit conduct whether or not such depictions are "obscene." In an opinion by Justice White, this Court upheld the statute from First Amendment attack based on three considerations of relevance here.

First, the Court found that "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'" and the "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." Id. at 756-57, quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982).

Further, the Court found that:

> The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.

Id. at 759-760 (footnote omitted). The Court concluded, in part because of the compelling state interests involved, that child pornography was not protected by the First Amendment.

(3) The Child Protection Act of 1984

In response to the Supreme Court's decision in Ferber, Congress enacted the Child Protection Act of 1984. The Child Protection Act removed the "obscenity" element from the trafficking offenses under 18 U.S.C. § 2252. The Child Protection Act also extended the statutory prohibition to production and trafficking in child pornography for non-commercial purposes. As the House Judiciary Report states:

> Perhaps the most important limitation in existing law is the "commercial purpose" limitation ... Those persons who use or entice children to engage in sexually explicit conduct for the purpose of creating child pornography do not violate [18 U.S.C. § 2251] unless their conduct is for pecuniary profit ... Since the harm to the child exists whether or not those who initiate or carry out the schemes are motivated by profit, the Subcommittee found a need to expand the coverage of the Act by deleting the commercial purpose requirement.

H. Rep. No. 536, 98th Cong., 1st Sess., at 2-3 (1983) reprinted in 1984 U.S. Code Cong. & Admin. News, 493-494.

(4)The 1986 and 1988 Acts

Congress revisited the issue of child pornography in 1986 following the release of the Final Report of the Attorney General's Commission on Pornography. The Report noted that a "significant aspect of the trade in child pornography, and the way in which it is unique, is that a great deal of this trade involves photographs taken by child abusers themselves, and than either kept or informally distributed to other child abusers." Attorney General's Commission on Pornography, Final Report, at 406-407 (1986) (emphasis added). The Report continued:

> We have heard substantial evidence that both situational and preferential child molesters frequently take photographs of children in some sexual context. Usually with non-professional equipment, but sometimes in a much more sophisticated manner, child abusers will frequently take photographs of children in sexual poses or engaged in sexual activity, without having any desire to make commercial use of these photographs. At times the child abuser will merely keep the photograph as a memento, or as a way of recreating for himself the past experience. Frequently, however, the photograph will be given to another child abuser, and there is substantial evidence that a great deal of "trading" of pictures takes place in this manner.

The Attorney General's Commission made three unanimous findings of particular relevance here. First, as this Court recognized in Ferber (see 458 U.S. at 756), the Commission found that child pornography constitutes a "permanent record" of the sexual abuse visited upon the child and, further, that such depictions "follow the child up to and through adulthood" causing harms which are "independent of the harms attendant to the circumstances in which the photographs were originally made." Final Report at 411. The Commission also found that "there is substantial evidence that photographs of children engaged in sexual activity are used as tools for further molestation of other children." Id. (emphasis added). The victims of molestation "are shown pictures of other children engaged in sexual activity, with the aim of persuading especially a quite young child that if it is in a picture, and if other children are doing it, then it must be all right for this child to do it." Id.

Reflective of these concerns, the 99th Congress enacted both the Child Sexual Abuse and Pornography Act of 1986 and the Child Abuse Victim's Rights Act of 1986. The Child Abuse Act of 1986 provides further sanctions against the sexual exploitation of children for non-commercial purposes by once again amending the Mann Act so that it would apply to the interstate transportation of children for prohibited sexual purposes (including the production of sexually explicit materials) regardless of whether the defendant had a commercial purpose. The Act also amended 18 U.S.C. § 2251 to prohibit advertisements knowingly made either for children to participate in the production of pornographic materials or for such materials. Penalties for these new offenses were the same as those available for child pornography production and trafficking offenses.

The Child Abuse Victim's Rights Act of 1986 increased the penalty provisions of 18 U.S.C. §§ 2251 and 2252 and increased the mandatory minimum penalty for subsequent convictions under either statute from two to five years.

Pub.L. 99-500, Title I, Section 101(b) [Title VII, Sections 702, 704], Oct. 18, 1986, 100 Stat. 1783-75; Pub.L. 99-591, Title I, Section 101(b) [Title VII, Sections 702, 704], Oct. 30, 1986, 100 Stat. 3341-74.

Congress revisited these statutes again in 1988 when it enacted the Child Protection and Obscenity Enforcement Act of 1988 as part of the Anti-Drug Abuse Act, P.L. 100-690, Sec. 7501, 102 Stat. 4485 (1988). Among other things, the Act strengthened the criminal and civil forfeiture provisions applicable to child pornography offenses, amended R.I.C.O. (18 U.S.C. 1961) to make violations of 18 U.S.C. §§ 2251 and 2252 predicate offenses, and imposed recordkeeping requirements on the producers and distributors of pornographic materials.

From 1983 to mid-1986, a total of 194 bills were introduced and 13 hearings took place, focusing specifically on aspects of child abuse or child sexual exploitation[2]. In the midst of this, the U.S. Senate Committee on Governmental

[2] Report to the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs of United States Senate by Congressional Research Service, Washington, June, 1986.

Affairs, Subcommittee on Investigations, conducted a study and issued various findings on the subject of "Child Pornography and Pedophilia," contained in Report 99-537. This Report found, among other things, that "no single characteristic of pedophilia is more pervasive than the obsession with child pornography." S. Rep. No. 537, 99th Cong., 2d Sess., 9 (June, 1986). The Report continued:

> Each convicted child molester interviewed by the Subcommittee either collected or produced child pornography or both.... It is not unusual for pedophiles to possess collections containing several thousand photographs, slides, films, videotapes and magazines depicting nude children and children engaged in a variety of sexual activities - alone, with other children, with adults, and even with animals. In some child pornography, the children depicted are infants and toddlers, some as young as 18 months.

Id. The Report also found that, "as a large number of cases illustrate, child molesters come from virtually every type of background in society" and that "to their neighbors and co-workers they were often respected, responsible members of the community, remembered by some acquaintances as being 'great with kids.'" Id. at 3.

In part because consumption of child pornography and child molestation are so closely connected, and in part because those who commit such crimes are so difficult to detect and apprehend, the Report recommended that law enforcement "task forces must be engaged in 'proactive' investigations, and not just respond to crises as they occur.... Duties of the task forces would include ... (c)onducting proactive and undercover investigations." Id. at 47.

(5)The Case of Osborne v. Ohio and Congress' Response

Finally, in response to Osborne v. Ohio, 495 U.S. _____, 110 S.Ct. 1691 (1990), Congress revisited child pornography legislation. Osborne involved the State of Ohio's statute proscribing the possession of child pornography, even in one's own home. In upholding the statute's constitutionality, the Court again addressed the evil of this vile crime:

> ...(E)ncouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.... Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribu-

tion chain.

Id. at 1697. As a result, Congress amended 18 U.S.C. § 2252 to outlaw the possession of child pornography as a part of the Crime Control Act of 1990. Again, recognizing the terrible tragedy of this crime against children and the great government interest in stamping it out at all levels -- production, distribution, and possession[3].

The current federal statutes prohibiting the production of and trafficking in child pornography are based upon findings made by all three branches of the federal government concerning the harmfulness of such activities both to the specific child victims involved and to society at large. Moreover, Congress fully recognized that the distribution of child pornography involved highly clandestine networks of distributors and consumers -- many of whom where themselves child molesters. It was fully anticipated by the Congress that law enforcement authorities would develop

[3]Congress in 1990 also restored the record keeping provision of 18 U.S.C. § 2257 requiring producers of sexually explicit materials to keep adequate records and documentation of the "actors," including their ages and other relevant information.

appropriate techniques for discovering and apprehending those involved in the distribution or consumption of child pornography. As discussed below, the investigative techniques employed in this case are essential to the effective enforcement of federal child pornography statutes.

B. LAW ENFORCEMENT TECHNIQUES OF THE TYPE EMPLOYED IN THIS CASE ARE ESSENTIAL FOR EFFECTIVE ENFORCEMENT OF CHILD PORNOGRAPHY.

As this Court recognized in Ferber and Osborne, the governmental interest in eradicating child pornography is tremendous. Also, because of the unique nature or the mechanics of how this crime takes place, unique law enforcement techniques and procedures must be employed. Such techniques include undercover operations, stings, reverse stings, and other "proactive" investigative methods.

> Given the sophisticated secretive manner in which many successful child molesters/pornographers operate, law enforcement has had to develop imaginative strategies to locate offenders and develop evidence of their crimes. One of the most successful techniques utilized is the so-called "reverse sting" operation wherein the government agency has offered, through an appropriate cover identity, to sell and ship child pornography to targeted in-

> dividuals under controlled deliveries, followed immediately by a search and seizure.

"The Preparation and Trial of an Obscenity Case: A Guide for the Prosecuting Attorney," Citizens for Decency through Law, Inc. (2nd ed.) p. 35 (1988).

Petitioner suggests that the use of such techniques may constitute unlawful entrapment per se when he states that:

> The red flags [of unlawful government inducement of the petitioner] fly in a stiff breeze in this case. Ray Mack's plan for intelligence gathering, the execution of which did not contemplate selling anything (T.R. 95:6) was administratively elevated in Washington, D.C. to a national program in which the postal authorities would actually solicit, advertise, sell, manufacture and deliver child pornography. The targets were completely passive. All they had to do was mail in their money, pick up the contraband at the post office and prepare to be indicted.

Petitioner's Brief at 28. Congress, however, was well-aware of the investigative challenges presented by the production and distribution of child pornography and of the methods, such as those used in this case by postal authorities to meet those challenges. While deliberating on the Child Protection Act of 1984, the House Judiciary

Committee received testimony from the U.S. Department of Justice that "the clandestine nature of the child pornography industry has made it extremely difficult to prosecute those who use children to produce pornographic material. Traditional investigative techniques, such as interviews and grand juries, are not always effective in making prosecutable cases." See. H. Rep. No. 536, 98th Cong. 1st Sess., at 12, reprinted in 1984 U.S. Code Cong. & Admin. News 503. The Committee also received testimony from the U.S. Postal Inspection Service on how child pornography investigations are conducted.

> During adult obscenity investigations, we are often able to order materials directly from solicitations or advertisements but, with child pornographers, we must gain access to the distributors' underground networks. We monitor those publications oriented toward pedophiles, and we maintain close contact with local police and social workers who, in their work, frequently come upon child abuse and\or child pornography. We also examine evidence, such as mailing lists seized during the execution of search warrants, in an effort to identify persons interested in this type of material... Our jurisdiction is limited to postal-related offenses, and investigations generally follow an identification, test correspondence, test pur-

chase procedure.

Id. at 507. The testimony from both agencies was included in full in the report of the Judiciary Committee on the 1984 Act.

The necessity for these type of investigative methods has also been recognized by various courts. In United States v. Esch, 832 F.2d 531 (10th Cir. 1987), cert. denied, 485 U.S. 908, 991 (1988), the U.S. Postal Service commenced an undercover operation which targeted suspected pedophiles. A co-defendant returned a questionnaire which the postal agent interpreted as indicating an interest in pedophilia. As the result of a series of correspondence, the defendants were arrested and convicted of sexual exploitation of children. The defendants argued that the postal inspectors' conduct in carrying out the undercover operation -- the reverse sting -- was so outrageous that their convictions should be reversed on due process grounds. The Court stated, however:

> We hold that the undercover operation did not constitute intolerable governmental conduct.... While it is true that [the postal agent] encouraged [the co-defendant] to take photographs, and that other mail

> was forwarded during the course of the "Love Land" operation, the postal inspectors' conduct was not outrageous in light of the clandestine nature of the activity that they were investigating. To the contrary, we agree with the trial court's observation that it was reasonable for the postal inspectors to assume that the only way they could ferret out suspected pedophiles was to encourage the photograph[ing] and mailing of what was otherwise being done or what they thought was being done.

Id. at 538-39 (emphasis added). See also U.S. v. Rubio, 834 F.2d 442, 450-51 (5th Cir. 1987)(no entrapment as a matter of law in spite of the fact that "Government engaged in extensive efforts to cause Rubio to purchase and send child pornography through the mail.")

The use of undercover investigation of child pornography violations has been addressed numerous times by various courts. The courts have continually recognized the need for such operations in view of the unique nature of the crime and the great societal interests at stake. The courts have rejected entrapment and outrageous conduct defenses in factual situations similar to the one involved here. See United States v. Thoma, 726 F.2d 1191 (7th Cir.)(not entrapment as a matter of law although defendant was

reluctant to respond to governments' mailings, in fact ignoring first two), cert. denied, 467 U.S. 1228 (1984). Rubio, supra (defendant did not respond to government's initial inquiry); United States v. Orton, 742 F.Supp. 562 (D. Or. 1990)(defendant not entrapped by government's correspondence, although initial contact had nothing to do with child pornography, but rather was an advertisement in a "swinger's" magazine); United States v. Nelson, 847 F.2d 285 (6th Cir. 1988)(postal inspector sending five letters from four sources not entrapment even though defendant ignored first four letters); United States v. Porter, 709 F.Supp. 770 (E.D. Mich. 1989)(defendant's name obtained from mailing list of pornography distributor, although no showing that child pornography previously distributed to defendant, the court found no entrapment), aff'd without opinion, 895 F.2d 1415 (6th Cir.), cert. denied, 111 S.Ct. 583 (1990).

C. EVIDENCE OF DEFENDANT'S PREDISPOSITION TO RECEIVE CHILD PORNOGRAPHY IS SUFFICIENT AS A MATTER OF LAW

Defendant's predisposition to receive child pornography was evidenced by his initial order of the two magazines, featuring photos of nude adolescent boys. United States v. Jacobson, 916 F.2d 467, 468 (1990). Subsequent actions by the defendant further support the theory that defendant had the requisite intent and state of mind to be the proper subject of investigation.

The entrapment defense focuses on the accused's predisposition to commit a crime. United States v. So, 755 F.2d 1350, 1354 (9th Cir. 1985). Predisposition is, by definition, "the defendant's state of mind and inclinations before his initial exposure to the government agents." United States v. Jannotti, 501 F.Supp. 1182, 1191 (E.D. Pa. 1980), rev'd on other grounds, 673 F.2d 578 (3rd Cir.), cert. denied, 457 U.S. 1106 (1982). The government had no contact with the defendant until after the mailing list, containing the defendant's name, was seized in the California bookstore. Prior to any governmental involvement, defen-

dant had already ordered and received materials demonstrating his sexual preference for male children. It is of no significance whether the materials were legally child pornography or not. The mere ordering of this type of materials -- magazines featuring photos of nude adolescent boys -- demonstrates the defendant's tendency towards pedophilia, and, as explained earlier, child pornography is almost always tied to pedophilia. Thus, defendant's pre-exposure activities established an "inclination" toward the particular criminal behavior at issue.

Although predisposition exists before contact with the government, courts have recognized that in most cases it must be determined after the fact. Typically, proof of predisposition is inferred from examination of defendant's conduct after the initial contact with the agents. United States v. Kaminski, 703 F.2d 1004, 1008 (7th Cir. 1983). A factor in determining this predisposition is whether the defendant evidenced any reluctance to engage in criminal activity which was overcome by government inducement. United States v. Reynoso - Ulloa, 548 F.2d 1329, 1336 (9th

Cir. 1977), cert. denied, 436 U.S. 926 (1978). Predisposition of criminal intent has been found where the defendant is "ready and willing" to commit the crimes as soon as the first opportunity is presented by the government. United States v. Sherman, 200 F.2d 880, 882 (2nd Cir. 1952).

The defendant showed no reluctance to receive child pornography. To the contrary, defendant affirmatively responded to offers of pornography. It is important to remember that defendant paid a membership fee, indicating his preference for preteen sex, in response to a governmental inquiry. When a postal inspector contacted him a second time, he responded again with a desire to receive more materials and expressing an interest in "teenage sexuality." When invited to order a catalog of child pornography, he jumped at the opportunity, and then from it ordered Boys Who Love Boys, described in the catalog as "eleven year old and fourteen year old boys get it on in every way possible. Oral, anal sex and heavy masturbation. If you love boys, you will be delighted with this." Jacobson did "love" boys and the government's actions here

simply gave him an opportunity to act on that predisposition. All correspondence was done through the mail, giving defendant every opportunity to disregard the offers by simply tossing them in the wastebasket. In fact, if the defendant felt harassed by these mail inquiries, he could have complained to his local mail authorities. Any doubt as to defendant's predisposition prior to government contact can be negated by his willing participation in the mail order pornography business. His pre-existing appetite for child pornography was merely exposed. The defendant was not induced to do anything he was not "ready and willing" to commit.

D. THE ACTIVITIES OF THE GOVERNMENT WERE NOT SUFFICIENTLY OUTRAGEOUS TO PROVIDE THE DEFENDANT WITH A SEPARATE DEFENSE OF OUTRAGEOUS CONDUCT.

The defendant's predisposition to commit the crime of receiving child pornography forecloses the possibility that his due process rights were violated, because he had no

constitutional right to possess child pornography. Osborne v. Ohio, 495 U.S. ____, 110 S.Ct. 1691 (1990).

In Hampton v. United States, the Court recognized that there can be no separate defense of "outrageous conduct" which would violate defendant's due process rights when the defendant had no right in the first place. 425 U.S. 484 (1976) (plurality opinion -Rehnquist, with White and Chief Justice Burger joining). However, if the result of the government activity is to "implant in the mind of an innocent person the disposition to commit the alleged offense," then the defense of entrapment is available. Id. at 490, quoting Sorrells v. United States, 287 U.S. 435 (1958). Although five justices recognized in Hampton that defendant's predisposition is irrelevant when the conduct is truly outrageous, this defense has been very rarely used or successful. See United States v. Warren, 747 F.2d 1339 (10th Cir. 1984). Post-Hampton cases have held the standard of proof of outrageous conduct to be very high. Gunderson v. Schlueter, 904 F.2d 407 (8th Cir. 1990). The cases indicate that due process grants wide leeway to law

enforcement agencies in their investigation of a crime. Kaminski, 703 F.2d at 1009.

The activities of the government here were a far cry from "outrageous." The postal inspectors did not implant in defendant's mind any criminal intent that was not there prior to the investigation. As the Eighth Circuit summarized:

> All told, the postal inspectors mailed Jacobson two sexual attitude surveys, seven letters measuring his appetite for child pornography, and two sex catalogues. Jacobson responded with interest on eight occasions.

916 F.2d at 468. This was only ten mailings over a period of twenty-seven months and, again, the defendant could have simply ignored them all.

Given the policy arguments supporting the eradication of child pornography in this country, the leeway given to government officials to use undercover tactics, as found in this case, is necessary and justifiable. See Jannotti, 501 F.Supp. at 1189.

Therefore, because the defense of outrageous governmental conducts rests on the assumption that a right was violated, it is not available in this case because the defendant has no right to possess child pornography.

CONCLUSION

By enacting 18 U.S.C. § 2252, Congress sought to suppress and eliminate the evil of sexual exploitation of children through the distribution of materials depicting minors engaged in sexually explicit conduct. Congressional efforts to protect children from such exploitation extend over a thirteen year period. They reflect a clear expectation that law enforcement authorities would develop the type of innovative investigatory techniques employed in this case. We ask this Court to consider that a decision sharply curtailing the use of such techniques will frustrate the policies that Congress has for so long labored to erect. We urge that the Court find that petitioner was neither entrapped as a

matter of law nor subjected to governmental conduct so outrageous as to require that his conviction be overturned.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of Amici Curiae, Hon. Thomas J. Bliley et al. have been sent by U.S. Mail, Postage Prepaid, on this 26th day of July, 1991, to:

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All parties required to be served have been served.

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APPENDIX

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July 22, 1991

VIA FACSIMILE AND U.S. MAIL

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RE: Jacobson v. United States
Docket No. 90-1124

Dear Mr. Mueller:

This letter is to confirm that you have my consent to file an amicus curiae brief in the above captioned case.

However, the Jacobson case has nothing to do with child pornography since the only exploiter of children in this case was the Government.

Of course, I am sure groups like yours are not a bit interested in what the Government did in this case because you undoubtedly believe that the Government can do no wrong.

Yours truly,

MOYER, MOYER, EGLEY, FULLNER & WARNEMUNDE

By

GMM JR:jkn

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July 22, 1991

David E. Anderson
Minority Chief Counsel
Congress of the United States
House of Representatives
Washington, D.C. 20515

Re: Jacobson v. United States, No. 90-1124

Dear Mr. Anderson:

This is in response to your letter of July 19, 1991.

On behalf of the United States I hereby consent to the filing of a brief as amicus curiae on behalf of Congressman Thomas J. Bliley, Jr., and various other members of the Congress of the United States in the above case.

Sincerely,

Kenneth W. Starr
Solicitor General